In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 765

LESLIE E. JETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, having waived a jury trial, was found guilty by the district court on two counts of wilfully attempting to evade his income taxes (26 U.S.C. 7201), and on one count of subscribing a return which he knew to be false (26 U.S.C. 7206(1)). He was acquitted on two other counts charging the subscribing of false returns. The court imposed concurrent sentences of imprisonment for eighteen months on each of the three counts upon which petitioner was convicted. (R. 2a–5a, 81a–88a.) [1]

[1] The record is composed of the printed appendices filed by the parties in the court below. "R." references are to petitioner's appendix, and "Supp. R." references are to the government's appendix.

207-849—66

Petitioner was elected sheriff of Davidson County, Tennessee, in 1960 (Supp. R. 136b). The years here in question include 1960 and 1961. The two evasion counts were based on the net worth theory. The government presented evidence from which it could be concluded that petitioner had understated his taxable income by $7,963 in 1960, and $4,843 in 1961[2] (Pet. 25–26, 32–33; R. 90a–91a). The defense conceded that it had no explanation whatsoever for at least $1,500 of the unexplained 1961 increase in net worth (Supp. R. 202b, 210b–211b). The government showed two sources from which unreported income could have been derived—payoffs by law-violators and political contributions used to pay petitioner's personal expenditures. Regarding payoffs, there was evidence that illegal gambling and liquor establishments operated openly in petitioner's jurisdiction (Supp. R. 122b–123b, 134b, 142b, 155b); that petitioner sent his administrative assistant to demand $2,000 from one such law-violator (Supp. R. 123b–132b, 193b–201b); and that the operators of certain such establishments made payments to petitioner (Supp. R. 126b, 149b–156b, 159b–173b, 203b–204b).

Petitioner admitted that he had used contributions to his political campaign for personal living expenses (R. 50a–53a; Supp. R. 188b–191b), but testified that he had been advised by an attorney that political contributions were non-taxable (R. 53a–54a, 64a–67a,

[2] The government claimed an unexplained 1961 net worth bulge of $5,966.42, but the court of appeals found insufficient proof of a claimed personal expenditure for $1,123.30 (Pet. 28–29), thus reducing the 1961 bulge to $4,843.12.

70a–73a). There was evidence, however, that petitioner had not told the attorney that he was using the campaign funds for personal living expenses (R. 34a–38a; Supp. R. 182b–184b). There was also evidence that petitioner gave conflicting statements to the agents during their examination of his returns (Supp. R. 27b–42b, 132b–156b).

The false return count was based on the omission of a specific item of income from petitioner's 1961 return (R. 4a–5a). Ernest Jones, Jr., testified that he gave petitioner $500 in currency in late 1961 in order to retain his contract to supply gasoline to the sheriff's patrol (R. 20a–25a; Supp. R. 73b–75b).

Petitioner did not request special findings of fact (Supp. R. 210b). In rendering his general finding of guilty on the two net worth counts, the trial judge made it clear that he believed the government's evidence of payoffs, but did not mention the political contributions aspect of the case (R. 81a–86a). The district judge also accepted the evidence that the $500 payment by Jones in 1961 was not a bona fide gift, but was made in an effort to retain a business account (R. 85a).

The petition for certiorari ignores the evidence of payoffs and the 1961 payment by Jones. Instead, it focuses on the political contributions and argues (1) that receipts of this nature are not taxable income (Pet. 10–13), and (2) that, even if they are taxable, the evidence that petitioner wilfully failed to report them is insufficient and in some respects improper (Pet. 13–22). There is no necessity for the Court to

reach these questions, since the sentences on all three counts are concurrent and petitioner does not seriously challenge his conviction on the false return count involving the 1961 Jones payment.[3] *United States* v. *Gainey*, 380 U.S. 63, 65; *Hirabayashi* v. *United States*, 320 U.S. 81, 85. Moreover, the evidence of payoffs, which the trial judge accepted (R. 83a, 84a, 85a), provides a likely source for the net worth increases, regardless of the political contributions. In addition, as we will now show, petitioner's contentions regarding the political contributions are without merit:

1. Petitioner did not challenge the taxability of political contributions used to pay personal expenses in either of the courts below. At trial, his defense was that most of the funds used for living expenses came to him, not as political contributions, but as unrestricted gifts from personal friends, and that he was advised by an attorney that they did not repre-

[3] Petitioner implies (Pet. 5–7) that his conviction of the 1961 charge (R. 4a–5a) was inconsistent with his acquittal on the 1960 charge (R. 3a) involving similar payments. But petitioner was running for office in 1960, and the trial judge apparently believed that the payments in that year could have been intended as political contributions. The judge stated that the question as to 1960 was "very close" and since he had some "lingering doubts" he would resolve it "in favor of the defendant." (R. 84a). In 1961, on the contrary, there was no campaign and no evidence to indicate that the $500 payment by Jones in that year was a campaign contribution (R. 85a).

sent taxable income[4] (R. 52a–54a, 70a–72a; Supp. R. 145b). Petitioner conceded that after the Internal Revenue Service began its investigation and he obtained other counsel, he reported such receipts as income in his 1962 return (R. 54a, 66a–67a; Supp. R. 34b, 39b). Both in the trial court (R. 76a–81a; Supp. R. 145b) and in the court of appeals (Pet. 29–31) it was recognized that the real issue was whether petitioner had wilfully omitted taxable income from his returns.

Even if the issue of taxability were presented by this record, there is no confusion in the present state of the law on the subject. As the court of appeals pointed out (Pet. 30–31), the Internal Revenue Service had ruled long before petitioner received the payments here in question that political contributions are taxable to the extent used to pay personal expenses. Rev. Rul. 54–80, 1954–1 Cum. Bull. 11. This ruling had been upheld by the Fourth Circuit in *O'Dwyer* v. *Commissioner*, 266 F. 2d 575, certiorari denied, 361 U.S. 862, and there is no decision to the contrary.

The government called as witnesses many of the people who gave money to petitioner during his politi-

[4] The government showed, on the other hand, that most of the donors felt they were making political contributions (Supp. R. 42b–58b, 65b–85b), and that petitioner did not tell his attorney that he was using the political contributions for personal rather than campaign expenses. (R. 34a–38a; Supp. R. 40b–42b, 182b–184b). The trial court resolved the conflict against petitioner.

cal campaign and their testimony demonstrates that they intended the money to be used for political rather than personal purposes (Supp. R. 46b, 47b, 49b, 51b, 52b, 54b, 55b, 58b, 66b, 68b, 71b). To whatever extent the trial judge relied upon diverted political contributions as proving a part of the unexplained net worth increases, it is clear that he found that the contributions were not unrestricted gifts but rather were intended to be used for political purposes. This type of factual judgment has traditionally been left to the trier of fact subject only to appellate review for substantial evidence. See, *e.g.*, *Commissioner* v. *Duberstein*, 363 U.S. 278.

2. The evidence of wilfulness was clearly sufficient. Petitioner's returns omitted taxable income of approximately $8,000 and $5,000 for 1960 and 1961, respectively (see *supra*, p. 2); there was evidence that at least some of this was derived from graft (Supp. R. 124b–127b, 149b–154b, 209b); petitioner paid his bills in cash, maintained no checking account, and kept no records of his political campaign funds (Supp. R. 29b, 136b, 191b); and his explanations during the investigation and at the trial were evasive and contradictory (R. 43a–45a; Supp. R. 12b–15b, 27b–42b, 132b–155b, 182b, 193b–201b). The government's use of petitioner's contradictory statements to the agents during the investigation (see Pet. 18–20) was obviously proper, since they were designed to conceal the offense charged in the indictment. It is not necessary for the prosecution to corroborate such statements (Pet. 14–17), since it was attempting to demonstrate that they were untrue.

Petitioner's reliance (Pet. 13–14) on *James* v. *United States,* 366 U.S. 213—which he concedes would affect only the 1960 evasion count—is misplaced. In 1946 this Court in *Commissioner* v. *Wilcox,* 327 U.S. 404, held that the proceeds of embezzlement were not taxable income. In *James* the Court overruled *Wilcox* but held that since the taxpayer in that case "might have relied on" *Wilcox* (366 U.S. at 221), he could not have intended to evade his income tax on the embezzled money. There are two reasons why petitioner could not reasonably have relied on *Wilcox* as exempting his diverted political contributions from income tax. First, the *Wilcox* holding was explicitly based on the now repudiated theory that the taxpayer had "at all times an unqualified duty and obligation to repay the [embezzled] money to his employer" (p. 408). This reasoning is not, however, applicable to the instant case; petitioner has shown no obligation under State law to repay political contributions which are used to pay personal expenses. Second, even if State law did create such an obligation, petitioner would not come within the scope of the *Wilcox-James* rule. At least 9 years before petitioner first failed to report diverted political contributions as income, this Court had limited *Wilcox* "to its facts" by distinguishing between embezzlement and extortion. *Rutkin* v. *United States,* 343 U.S. 130, 138. Thereafter the lower courts applied *Wilcox* only in cases of classic embezzlement. See *James* v. *United States,* 366 U.S. at 217. In light of the unequivocal state of the law concerning the taxability of political contri-

butions diverted to personal use at the time of petitioner's acts (see Rev. Rul. 54–80, *supra; O'Dwyer* v. *Commissioner, supra*) and the manifest differences between embezzlement and the personal use of political contributions, petitioner is not the type of taxpayer "who might have relied on" *Wilcox. James* v. *United States,* 366 U.S. at 221.

Finally, petitioner's contention that the lower courts have impaired the defense of reliance upon advice of counsel (Pet. 20–22) ignores a conflict in the testimony. Petitioner testified that he had informed the attorney that he had used political contributions for living expenses (R. 53a, 70a). The attorney denied this (R. 38a), and, as the court of appeals observed (Pet. 29), the trial court was well within its province in resolving the conflict against petitioner.

The petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
RICHARD M. ROBERTS,
Acting Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN P. BURKE,
Attorneys.

FEBRUARY, 1966.

U.S. GOVERNMENT PRINTING OFFICE:1966